

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON HERRICK ANDERSON,

Defendant-Appellant.

UNPUBLISHED

January 24, 2008

No. 274466

Wayne Circuit Court

LC No. 06-008362-01

Before: Whitbeck, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant Jason Anderson appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder,¹ and domestic violence.² The trial court sentenced Anderson to 38 months to 10 years' imprisonment for the assault conviction and 93 days in jail for the domestic violence conviction. We affirm.

I. Basic Facts And Procedural History

Anderson's convictions arise out of a domestic dispute between Anderson and his live-in girlfriend of 14 years, Heidi Wilder. Wilder and Anderson lived together at the time of the dispute and have three children. On the day of the dispute, Wilder returned home from work at about 5:45 a.m. Anderson normally began work at 6:00 a.m., and was already gone when Wilder returned home. Wilder saw her children off to school between 6:40 a.m. and 8:15 a.m. Wilder was then sitting on the couch when Anderson unexpectedly came through the front door. Anderson put a CD in the stereo and said to Wilder, "This is the last song you are going to hear." Wilder recognized that Anderson was not acting normally but did not confront him about it. She got up from the couch and went into the kitchen. Anderson came into the kitchen and started putting on a pair of latex gloves. Wilder asked Anderson what he was doing, to which he responded that he was applying lotion to his hands. Once he finished putting on the second glove, he punched Wilder in the lower left jaw causing her to fall to the ground and her glasses to fly off.

¹ MCL 750.84.

² MCL 750.81(2).

As Wilder lay on the floor, Anderson told her that “it was [her] fault” and that he “had to do this.” He then grabbed the back of her head by the hair and pulled her to the basement stairs. She tried to grab the telephone, which he took from her and threw out of her reach. He dragged her down the stairs to the basement. He pushed her down and repeated that he “[had] to do this.” Anderson proceeded to throw objects at her and kick her all over her body as she lay on the floor. At some point during the assault, Anderson told Wilder that she “was going to die in this basement.” She tried to persuade him to stop by “lying to him,” telling him that she “loved him; we can work this out.”

Anderson then took an electrical cord and tried to put it around Wilder’s neck in order to choke her. He was unable to get the cord over her head, but he choked her with his hands for a short period of time. Anderson then picked up a two and one-half pound weight and hit Wilder in the back of the head several times. Wilder testified that she did not see the weight before Anderson struck her but saw it after he put it back down on the ground. She observed that this one weight was not in its ordinary location with the remainder of the set of weights. After Anderson had struck Wilder several times with the weight, the phone rang. Wilder tried to convince Anderson that they needed to answer the phone because it might be the school. Anderson relented and they went upstairs, with Anderson still dragging Wilder by her hair.

Once upstairs, Wilder and Anderson sat at the kitchen table. They began to discuss a cell phone bill that Anderson had written on and presented to Wilder. Anderson was upset about calls Wilder made to a man with whom Anderson knew Wilder was having a relationship. Wilder testified that she was unhappy with her relationship with Anderson, and that Anderson knew she was unhappy and knew about her other relationship. The phone bill was admitted into evidence. Wilder continued to tell Anderson things she thought would make the assault stop. She told him that she was going to stay in their relationship, stop her other relationship, and “make it work.” At some point while they were in the kitchen, Anderson’s demeanor became calm. He stopped holding Wilder by her hair. Wilder estimated that this was at least two or three hours after the assault began.

In the early afternoon, Anderson allowed Wilder to go upstairs to the master bedroom. This was around the time that their oldest child would have been returning from school—“sometime before [2:00 p.m.]” Wilder observed Anderson cleaning her blood off of the floor in the kitchen as she retreated to the bedroom. She stayed in the bedroom for the entirety of that evening and into the next day. She did not see her children, and Anderson told them she was sick with bronchitis. Anderson checked on her several times, apologizing, drawing her a bath, and tending to some of her injuries. He also brought in a pizza for her to eat. Wilder testified that she did not see a phone in the bedroom even though there would normally be one there. She also said that she did not know if Anderson ever went to sleep the night of the assault; he only came into the bedroom occasionally.

Around 8:00 p.m. on the day after the assault, Wilder observed that Anderson had fallen asleep. She took this opportunity to gather the three children and leave the house. Wilder drove away with the children, looking for a police station. She did not find the police station so she stopped at a gas station. The gas station attendant prompted her to call the police, based on her appearance—her bruises and her black eyes. She made the call, and a police officer came to the gas station. The officer believed that Wilder needed medical attention and called an ambulance.

Wilder and her children were transported to a hospital, where Wilder's parents later came to retrieve the children.

After being treated at the hospital, Wilder returned to her house with the police. By this time, it was early in the morning, two days after the assault. She consented in writing to a search of her house and gave a key to the police to allow them to enter. The police found Anderson in the house and arrested him. They then searched the house. They retrieved a weight and electrical cord from the basement that matched Wilder's description of the items used in the assault. The police retrieved the cell phone bill with Anderson's handwriting from the garbage in the kitchen.

The police also found and retrieved several handwritten notes that appeared to be from Anderson to Wilder. Five of these notes were admitted into evidence. Wilder recognized Anderson's handwriting on the notes. Anderson wrote in the letters: "It was an accident, Heidi. I didn't hurt you on purpose"; "If I get arrested, please remember that I stayed by your side the whole time"; "Heidi, all this is because of that asshole Scott. He is a damn user, tricking you Heidi"; and, "I'm sorry."

The next day—three days after the assault—Wilder met with Officer Robert Grant. Officer Grant photographed Wilder's injuries. The photographs were admitted into evidence.

Wilder described her injuries as bruising all up and down her legs, black and blue eyes, a bruised jaw, pain in her neck and head, and bleeding behind her left ear. She stated that the bleeding was a result of the punch to the jaw and that her injuries from the weight were "internal." She stated to the nurse in the emergency room that the pain she was feeling "all throughout her body" was a nine on a zero-to-ten scale. At the hospital, Wilder was examined "head to toe" and found to have bruising throughout her body. She was also X-rayed and given a CAT scan, which did not disclose any further injury. Wilder received a prescription for a muscle relaxant and was released.

Among the photographs taken by Officer Grant was a close-up shot of Wilder's forehead. Officer Grant testified that he saw a "linear mark on her forehead" that seemed consistent with Wilder's description of Anderson's attempts to choke her with an electrical cord. He also testified that the "camera really didn't focus" and the resulting photograph did not accurately convey the mark that he saw.

Anderson was initially charged with assault with intent to commit murder,³ torture,⁴ assault with a dangerous weapon,⁵ domestic violence,⁶ and interfering with a crime report.⁷ The

³ MCL 750.83.

⁴ MCL 750.85.

⁵ MCL 750.82.

⁶ MCL 750.81(2).

⁷ MCL 750.483a.

trial court refused to bind over on the charge of torture at the preliminary examination. At trial, the court instructed the jury regarding the elements of the lesser-included offense of assault with intent to do great bodily harm,⁸ in addition to assault with intent to commit murder. The jury found Anderson guilty of assault with intent to do great bodily harm and domestic violence, but not guilty on the other counts.

The trial court sentenced Anderson on November 2, 2006. Anderson contested the scoring of offense variables (OVs) 1, 2, 3, 4, 7, 8, 10, and 19. The trial court scored each OV at or above the level recommended by the presentence report, over Anderson's objections, and sentenced Anderson to 38 months to 10 years' imprisonment for the assault conviction, and 93 days in jail for the domestic violence conviction.

Anderson now appeals.

II. Sentencing

A. Standard Of Review

Anderson argues that he is entitled to resentencing because his sentence before scoring of the OVs fell under the statutory intermediate sanction and, therefore, the trial court erred in scoring his OVs because doing so unconstitutionally enhanced his sentence in violation of *Blakely v Washington*⁹ by using facts not found by a jury. The question of whether Anderson's sentence was properly characterized as an intermediate sanction, within the ambit of *Blakely*, is unpreserved because Anderson did not raise the issue below.¹⁰ We review an unpreserved claim of constitutional error for plain error affecting a defendant's substantial rights.¹¹

B. Analysis

Michigan has an indeterminate sentencing scheme, by which a maximum sentence is set by statute according to the offense.¹² The minimum sentence is determined by the trial court's consideration of the offense, the offender's prior record, and other offense variables.¹³ This consideration establishes a statutory range of minimum sentences, from which the trial court has the discretion to choose a minimum sentence.¹⁴ The Legislature has also created an intermediate sanction scheme when the upper limit of an offender's minimum sentence range is 18 months or

⁸ MCL 750.84.

⁹ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

¹⁰ *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004).

¹¹ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

¹² *People v McCuller*, 479 Mich 672, 677; 739 NW2d 563 (2007).

¹³ MCL 777.21.

¹⁴ *McCuller*, *supra* at 677, 689-690.

less.¹⁵ The intermediate sanction may not exceed a jail term equal to the maximum sentence range, not to exceed 12 months.¹⁶

Anderson argues that, because his guidelines range was zero to nine months prior to scoring his OV's, at that moment, he had a legal right to an intermediate sanction and, under *Blakely*, may not have his sentence enhanced as a result of judicial fact-finding.¹⁷ Anderson acknowledges that *Blakely* does not apply to Michigan's indeterminate sentencing scheme.¹⁸ Nevertheless, Anderson argues that the intermediate sanction is an exception to Michigan's indeterminate sentencing scheme because it does not contain a minimum and maximum sentence. Anderson concludes, therefore, that because scoring his OV's will enhance his statutory maximum penalty—by increasing his guidelines range—the scoring *will* be subject to *Blakely* and require facts found by a jury. However, Anderson's contentions are contrary to recent Michigan Supreme Court decisions.

In *People v McCuller*, the Supreme Court held that a defendant does not gain a legal right to any guidelines range until all of the statutory factors have been considered.¹⁹ The trial judge determines a defendant's eligibility for such an intermediate sanction only after the scoring of prior record variables (PRVs) and OV's.²⁰ Therefore, "[a] sentencing court's fact-finding in scoring the OV's does not increase the defendant's statutory maximum under *Blakely*."²¹ The Court further explained as follows:

A sentencing court scores the OV's only to calculate the recommended range for the *minimum* portion of the defendant's sentence, not to arrive at the defendant's maximum sentence, which is set by statute. The conditional limit on incarceration contained in MCL 769.34(4)(a)—an intermediate sanction—does not establish the defendant's statutorily required maximum sentence authorized by the jury's verdict or the guilty plea, but is instead a matter of legislative leniency, giving a defendant the opportunity to be incarcerated for a period that is *less* than that authorized by the jury's verdict or the guilty plea. Therefore, even if defendant were to be sentenced on the basis of his PRV score alone, the sentencing court would not violate *Blakely* by sentencing him to the statutory maximum^[22]

¹⁵ MCL 769.34(4)(a).

¹⁶ *Id.*

¹⁷ *Blakely*, *supra* at 301 (stating that a jury must determine, beyond a reasonable doubt, any fact that increases the penalty for a crime beyond the prescribed statutory maximum).

¹⁸ *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778, cert den ___ US ___, 127 S Ct 592; 166 L Ed 440 (2006).

¹⁹ *McCuller*, *supra* at 689.

²⁰ *Id.*

²¹ *Id.* at 677.

²² *Id.* at 677-678 (internal citations omitted).

Therefore, contrary to Anderson’s assertions, the intermediate sanction provision of MCL 769.34(4)(a) is not distinct from Michigan’s broader indeterminate sentencing scheme and does not create a new statutory maximum penalty subject to the strictures of *Blakely*. *Blakely* merely “prohibits a judge from exceeding the maximum sentence authorized by the jury verdict or the guilty plea.”²³ The intermediate sanction remains a part of Michigan’s indeterminate sentencing scheme.²⁴

III. Offense Variable Scoring

A. Standard Of Review

Anderson alternatively argues that he is entitled to resentencing because the trial court erred in scoring his OV’s. We review for an abuse of discretion a trial court’s scoring decisions to determine whether the evidence supports the scoring.²⁵ We will uphold the trial court’s scoring if there is any evidence in the record to support it.²⁶

A trial court sets a defendant’s minimum sentence by assigning points to various factors—OV’s and PRV’s—under a preponderance of the evidence.²⁷ The trial court may consider all record evidence when making scoring decisions, and the trial court’s scoring need not be consistent with the jury’s verdict.²⁸

B. OV’s 1 And 2

The trial court scored ten points for OV 1 because “the victim was touched by any other weapon,”²⁹ and one point for OV 2 because “the offender possessed or used any other potentially lethal weapon.”³⁰ Anderson argues that because he was acquitted of assault with a dangerous weapon, there was insufficient evidence to show he used a dangerous weapon in the assault. We disagree.

The trial court based its decision on Wilder’s testimony of the assault plus the police’s recovery of the two objects that Wilder identified as Anderson’s weapons—a two and one-half pound weight and an electrical cord. Photographic and testimonial evidence also showed that

²³ *People v Harper*, 479 Mich 599, 616; 739 NW2d 563 (2007).

²⁴ *Id.* at 621-625.

²⁵ *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004), *aff’d* 473 Mich 399 (2005).

²⁶ *Id.*

²⁷ *Drohan, supra* at 142-143; *People v Perez*, 255 Mich App 703, 713; 662 NW2d 446, vacated in part on other grounds 469 Mich 415 (2003).

²⁸ *Perez, supra* at 712.

²⁹ MCL 777.31(1)(d).

³⁰ MCL 777.32(1)(e).

Wilder had been seriously beaten. We conclude that the evidence supports the trial court's scoring decisions for OV 1 and OV 2.

C. OV 3

The trial court scored ten points for OV 3 because Wilder sustained “[b]odily injury requiring medical treatment.”³¹ Anderson argues that Wilder did not have bodily injury requiring medical treatment because she was only taken to the hospital at the behest of the police and the only treatment she received was a prescription for a muscle relaxant. We disagree.

“[R]equiring medical treatment” refers simply to the necessity for treatment, regardless whether the victim even actually receives treatment.³² Here, Anderson actually received medical treatment—she was given a prescription and was also given an x-ray. And in scoring this variable, the trial court relied on the photographs of Wilder's injuries as well as the medical records from her hospital visit. Therefore, the evidence supports the trial court's scoring decision for OV 3.

D. OV 4

The trial court scored ten points for OV 4 because Wilder sustained “[s]erious psychological injury requiring professional treatment.”³³ Anderson argues that the prosecutor presented no evidence of psychological injury and notes that Wilder was undergoing psychological treatment before the assault. The trial court permitted Wilder to make a statement at the sentencing hearing before scoring OV 4. Wilder described for the trial court a history of Anderson's abusive behavior, culminating in the instant assault. She told the trial court that she was attending counseling sessions with her three children and was prescribed medication as a result of this incident. The trial court indicated that Anderson could not use the fact that his abuse was ongoing to claim that this assault was not the cause of her psychological injury. We therefore conclude that the evidence supports the trial court's scoring decision for OV 4.

E. OV 7

The trial court scored 50 points for OV 7 because the “victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense.”³⁴ Anderson argues that because he was not bound over on a charge of torture and was acquitted of assault with intent to commit murder, there was insufficient evidence to show that he treated Wilder with sadism, torture, or excessive brutality.

The trial court noted that, over the course of several hours, Anderson repeatedly told Wilder she was going to die, dragged her around the house by her hair, beat her, kept her from

³¹ MCL 777.33(1)(d).

³² MCL 777.33(3).

³³ MCL 777.34(1)(a).

³⁴ MCL 777.37(1)(a).

talking to her children, and kept her from leaving the house for over a day after the assault. The trial court found this sufficient evidence of “extreme or prolonged pain or humiliation.”³⁵ We agree that this evidence supports the trial court’s scoring decision for OV 7.

F. OV 8

The trial court scored 15 points for OV 8 for asportation of Wilder to a place of “greater danger.”³⁶ Anderson argues that because the entire assault took place within his and Wilder’s joint home, he never took her to a place of *greater* danger. The trial court noted that Anderson dragged Wilder by her hair into the basement, which would make it less likely for anyone to hear or discover the assault. The ownership status of the basement does not negate its characteristics as a more isolated location. We conclude that the evidence supports the trial court’s scoring decisions for OV 8.

G. OV 10

The trial court scored ten points for OV 10 because Anderson exploited his domestic relationship with Wilder.³⁷ Anderson and Wilder lived together with their three children. Anderson argues that there was no proof of exploitation, arguing that the statute states, “Do not automatically score points . . . just because one or more of the factors . . . are present in the circumstances.”³⁸ The trial court noted that Anderson returned to their joint home at a time when he would normally be at work, he knew Wilder would be there, and he knew that their children would be gone for several hours. The trial court stated that his knowledge and access enabled him to place Wilder in a position of greater vulnerability. This evidence supports the trial court’s scoring decision for OV 10.

H. OV 19

The trial court scored ten points for OV 19 because Anderson “interfered with or attempted to interfere with the administration of justice.”³⁹ Anderson argues that because he was acquitted of interfering with a crime report, there is no evidence to support this scoring decision. He further argues that Wilder was free to leave and report the incident but chose not to.

As noted previously, the trial court’s scoring need not be consistent with the jury’s verdict;⁴⁰ therefore, Anderson’s attempt to rely on the jury’s verdict is of no avail. Additionally, Wilder testified in direct contradiction of Anderson’s contention. She testified that Anderson

³⁵ MCL 777.37(3).

³⁶ MCL 777.38(1)(a).

³⁷ MCL 777.40(1)(b).

³⁸ MCL 777.40(2) states as follows: “The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.”

³⁹ MCL 777.49(c).

⁴⁰ *Perez, supra* at 712-713.

removed two telephones from her use, refused to allow her children to see her, and continually checked on her in the bedroom while she was recovering from the assault. She testified that she felt she could not leave the bedroom and only left the house once Anderson had fallen asleep. This evidence supports the trial court's scoring decision for OV 19.

Affirmed.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Bill Schuette